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Nos. 2, 3 and 4 Original

In the Supreme Court of the United States

OCTOBER TERM, 1929

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA, COMPLAINANTS

v.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO

STATE OF MICHIGAN, COMPLAINANT

v.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, ET AL.

STATES OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI AND ARKANSAS, INTERVENING DEFENDANTS

STATE OF NEW YORK, COMPLAINANT

v.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, ET AL.

ON PETITION OF THE STATE OF ILLINOIS FOR A TEMPORARY MODIFICATION OF PARAGRAPH 8 OF DECREE OF APRIL 21, 1930

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General.
JOHN J. HAYES,
Assistant to the Solicitor General.
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 2 Original

STATES OF WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA, COMPLAINANTS

v.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO

No. 3 Original

STATE OF MICHIGAN, COMPLAINANT

v.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, ET AL.

STATES OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI, AND ARKANSAS, INTERVENING DEFENDANTS

No. 4 Original

STATE OF NEW YORK, COMPLAINANT

v.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, ET AL.

ON PETITION OF THE STATE OF ILLINOIS FOR A TEMPORARY MODIFICATION OF PARAGRAPH 3 OF DECREE OF APRIL 21, 1930

MEMORANDUM ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

411315—56

STATEMENT

By its petition the State of Illinois seeks modification of the present limitation imposed by Paragraph 3 of this Court's Order of April 21, 1930, to permit the diversion of 10,000 cubic feet a second of water, in addition to domestic pumpage, from Lake Michigan into the "Illinois Waterway" for a period of 100 days. The alleged purpose of the increased diversion is to provide sufficient water in the Mississippi River between Cairo and Alton, Illinois, in the Alton Lock, and in the Illinois Waterway between Alton and La Grange, for the movement of barges during an anticipated period of very low flow in the Mississippi River resulting from unprecedented drought conditions in the midwest.

The decree of which modification is sought was entered on April 21, 1930.[1] By its terms, paragraph 3, the State of Illinois and the Sanitary District of Chicago were enjoined, after December 31, 1938, "unless good cause be shown to the contrary", from diverting "any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of the annual average of 1,500 cubic feet per second in addition to domestic pumpage". The Court retained jurisdiction of the several suits "for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy".

[1] 281 U. S. 696.

The United States is not a party to any of the entitled actions. However, the national and international interests involved in the proposed modification, and the fact that they have not been called to the attention of the Court by the parties, are such that the filing of this brief on behalf of the United States as *amicus curiae* is deemed necessary.

INTEREST OF THE UNITED STATES

The major interests of the United States arise under the Commerce clause of the Constitution,[2] and from its obligations to Canada under existing treaties.[3]

That the proposed increased diversion from Lake Michigan may have an effect upon navigation on Lake Michigan and the other Great Lakes is apparent from the Court's original opinion herein.[4] The interest of the United States in the matter of aid to navigation on the Illinois Waterway and the Mississippi River is equally apparent.

It is also clear that any diversion of the waters of Lake Michigan out of the watershed of the Great

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[2] Article I, Section 8. See *Sanitary District of Chicago* v. *United States*, 266 U. S. 405, 426 (1925) "* * * and that [a withdrawal of water from Lake Michigan which will affect the level of the Great Lakes] is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case."

[3] Convention between the United States of America and Canada signed at Washington, February 27, 1950, Treaties and Other International Acts, Series 2130; Treaty between the United States and Great Britain Relating to Boundary Waters, and Questions Arising between the United States and Canada, signed at Washington January 11, 1909, Treaty Series 548, 36 Stat., pt. 2, 2448.

[4] 278 U. S. 367, 409.

Lakes System will decrease to some extent the levels and flows of Lakes Huron, Erie, and Ontario and their connecting waterways. The interest of the United States in the proposed increased diversion from the standpoint of its effect upon international waters and the consequent need, in the proper conduct of foreign relations, for consultations with Canada prior to authorization thereof is therefore plain.

In addition, the treaty dated February 27, 1950 (*supra*, footnote 3) provides that the "total outflow" of Lake Erie, less requirements for domestic and sanitary purposes and for the service of canals for purposes of navigation (Article III), shall be utilized first to maintain certain stipulated flows over Niagara Falls (Article IV) and that the excess may be diverted for power purposes (Article V). The waters made available for power purposes are to be divided equally between the United States and Canada (Article VI). A diminution of the outflow of Lake Erie by increased diversions from Lake Michigan, without the express consent of Canada, might be considered a violation of the provisions of this treaty.

The treaty dated February 27, 1950, replaces the third, fourth and fifth paragraphs of Article V of the treaty dated January 11, 1909 (*supra,* footnote 3). Otherwise, the earlier treaty continues in force. By Article I thereof, the parties agreed that "the navigation of all navigable boundary waters shall forever continue free and open" and that "this same right of navigation shall extend to the waters of Lake Michigan". Although under Article II each of the parties reserved to itself, or the several State Gov-

ernments on the one side and the Dominion or Provincial Governments on the other, the exclusive control over the use and diversion of all waters on its own side which, in their natural channels, would flow into boundary waters, nevertheless it was agreed that any interference with or diversion from their natural channel of waters on either side of the boundary "shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs". Article II further provides that neither party surrenders any right, which it may have, "to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary". Thus, without regard to whether or not the waters of Lake Michigan constitute boundary waters within the definition thereof in the treaty dated January 11, 1909, the possibility of liability under the provisions of Article II establishes an interest of the United States in the proposed modification of the decree herein.

DISCUSSION

There have been periodic attempts by the State of Illinois and the Sanitary District of Chicago to obtain some modification of the restrictions of diversion of water to the Mississippi waterway imposed by the decree of this Court. The most recent of these attempts was in the form of legislation authorizing a temporary diversion. It was passed by the 83d Con-

gress, 2d Session, as H. R. 3300, and was vetoed by the President on September 3, 1954 (100 Cong. Rec. 15569). A second similar act was passed by the 84th Congress, 2d Session, as H. R. 3210, and was vetoed on August 9, 1956 (102 Cong. Rec. (unbound) A6471). Among the reasons in the first veto message was the following: "The diversion of waters into and out of the Great Lakes has historically been the subject of negotiations with Canada. To proceed unilaterally in the manner proposed in H. R. 3300 is not wise policy. It would be the kind of action to which we would object if taken by one of our neighbors." 100 Cong. Rec. 15569. Both messages refer to reports in progress by the Corps of Engineers and by the International Joint Commission which would determine the best methods of obtaining improved control of the levels of the Great Lakes.

The same international considerations which led to these vetoes have a bearing on the present petition. The rights of Canada as well as those of the States of the United States bordering on the Great Lakes, are involved. We attach as an Appendix to this memorandum a letter from the Legal Adviser of the Department of State relating to this phase of the matter.

There appears to be no dispute among the parties that an emergency does exist with respect to low water imperiling navigation at points on the Mississippi waterway. The Corps of Engineers has informed us that the proposed diversion would serve to raise the water level at the Alton Lock about 1.3 feet, the full effect of which on navigation has not

been ascertained, although it is reported that it would be sufficient to alleviate to some extent the present emergency. Moreover, there is an indication that the diversion urged by petitioner, even if regulated, would increase the velocity of the flow in certain reaches of the Illinois waterway to an extent that would result in a hindrance to navigation.

We submit this information for the consideration of the Court in addition to the legal issues which were before the Court at the time of its original decision. *Wisconsin* v. *Illinois*, 278 U. S. 367. Information from the reports referred to above (*supra*, p. 6) should be available early in January to aid in assessing the effect of the diversion.

J. LEE RANKIN,
Solicitor General.
JOHN F. DAVIS,
Assistant to the Solicitor General.
DAVID R. WARNER,
Attorney.

DECEMBER, 1956.

APPENDIX

DECEMBER 13, 1956.

DEAR MR. ATTORNEY GENERAL: The Office of the Solicitor General has orally requested the views of this Department on the position that the United States should present to the Supreme Court with respect to the petition of the State of Illinois to divert additional water from Lake Michigan to the Mississippi waterway.

The only interest of this Department in the controversy stems from the fact that we have with the Government of Canada a treaty concerning boundary waters signed January 11, 1909 (36 Stat. 2448) and a treaty relating to the uses of the water of the Niagara River signed February 27, 1950 (1 U. S. Treaties and Other International Agreements 694). If the proposed diversion should have a material effect on Canadian navigation of the Great Lakes or should result in any injury on the Canadian side of the boundary such as a diminution of the power development, it is conceivable that Articles 1 or 2 of the 1909 treaty might be involved. Canada also might conceivably make a claim under the 1950 treaty. If it should do so the Department would have to examine the claim to ascertain whether in its view it was well founded.

Canada was promptly notified of the pendency of the present proceeding and has not raised any objection with this Department. Under the circumstances, and as presently advised by the Corps of Engineers

as to the factual situation, the Department does not wish to request you to oppose the petition, but does feel that the two treaties above mentioned should be brought to the attention of the Court.

Sincerely yours,

HERMAN PHLEGER
The Legal Adviser.

For the Acting Secretary of State:

The Honorable
HERBERT BROWNELL, JR.,
Attorney General.

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